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Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-1311**

SHELL OIL COMPANY, SHELL PIPELINE CORPORATION, AMERICAN OIL COMPANY, a/k/a AMOCO OIL COMPANY AND STANDARD OIL COMPANY (INDIANA),
Petitioners,

v.

FRED WEBER, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners,

v.

FRED WEBER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Shell Oil Company and Shell Pipeline Company ("Shell") and Amoco Oil Company and Standard Oil Company (Indiana) ("Amoco") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on November 30, 1977.

OPINIONS BELOW

The opinion of the panel of the Court of Appeals * is reported at 566 F.2d 602 (8th Cir. 1977) and is set forth in the Appendix at 1a. The order denying peti-

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* The panel was composed of Judges Stephenson and Van Oosterhout of the Eighth Circuit and Judge Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

tioners' motions for rehearing and suggestions for rehearing *en banc* is set forth in the Appendix at 15a. The opinion of the United States District Court for the Eastern District of Missouri is reported at 432 F. Supp. 694 (1977) and is reproduced in the Appendix at 17a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

A judgment of the Court of Appeals for the Eighth Circuit was entered on November 30, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on December 28, 1977 and this petition for *certiorari* is filed within 90 days of that date.

QUESTIONS PRESENTED

I. Whether attorneys who participate actively in and cooperate fully with counsel for co-defendants in the joint defense of one litigation and who have access to confidences of such defendants by reason of that relationship are prohibited by the Code of Professional Responsibility and the requirements of sound judicial administration from subsequently acting as opposing counsel against those same defendants in litigation alleged to be substantially related to the prior litigation.

II. Whether the Panel and the District Court, instead of applying the prevailing rule requiring petitioners to demonstrate only that opposing counsel had *access* to their confidences in the prior representation, applied an improper standard in requiring petitioners to disclose specific confidences actually received by opposing counsel.

III. If proof of actual receipt of confidential information is required for disqualification of opposing counsel

in the circumstances enumerated above, whether there were sufficient facts establishing that such counsel did, in fact, receive information exchanged in confidence by petitioners in the prior litigation.

RULES INVOLVED

This case involves the construction and proper application of Canons 4 and 9 of the American Bar Association's Code of Professional Responsibility, adopted by the Missouri Supreme Court as Rule 4 of the State's Rules Governing the Bar and Judiciary.[1]

STATEMENT OF THE CASE

This petition seeks review of an unprecedented decision of a panel of the United States Court of Appeals for the Eighth Circuit which permits an attorney to change sides in litigation and accept representation against parties to whose confidences he previously had access under protection of the attorney-client privilege in proceedings which are claimed to be substantially related to the subject matter of his present representation. The panel's decision impermissibly sanctions behavior which threatens an abuse of a confidential relationship and which creates at least an appearance of impropriety in violation of the Code of Professional Responsibility. It directly conflicts with decisions of the United States Court of Appeals for the Second Circuit in which opposing counsel are disqualified if they have had access to a party's confidences through a prior confidential relationship. Further, if not

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[1] Canon 4 provides that "A Lawyer Should Preserve the Confidences and Secrets of a Client."

Canon 9 commands that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," though none is actually present, thereby codifying the general precept that a "lawyer should promote public confidence in our system and in the legal profession." ABA Code of Professional Responsibility, Ethical Consideration 9-1.

reversed, the panel's decision will inevitably preclude co-operation among counsel for co-defendants in multi-defendant litigation, thereby increasing the unmanageability of such litigation and chilling defendants' exercise of their constitutional right to effective assistance of counsel.

A. The Prior Criminal Proceedings Involving Shell, Amoco and Clients of the Lashly Firm.

Plaintiff Fred Weber, Inc. ("Weber") is represented in this case against Shell and Amoco, defendants below, by the law firm of Lashly, Caruthers, Thies, Rava and Hamel ("Lashly firm") and three partners of that firm, Edward D. Weakley, William I. Rutherford and Paul B. Rava. During 1964 and 1965, the Lashly firm, including Mr. Rava, represented six co-respondents and co-defendants of Shell and Amoco during a nine-month grand jury investigation and an ensuing criminal case, *United States* v. *American Oil Co., et al.*, No. 65 CR 150(3), which the courts below found to be substantially related to the present litigation.[2]

It is undisputed that during the course of such prior criminal proceedings counsel for Shell and Amoco and the members of the Lashly firm joined other defense counsel in a cooperative effort to investigate the nature of the evidence adduced against them, the scope of the potential liability to which they might be exposed, the identity of the witnesses summoned before the grand

[2] John H. Lashly and Paul B. Rava and the Lashly firm represented Kerr-McGee Oil Industries, Inc. and its employee Jack Mitchell, Edward C. Gomes (President and a stockholder of Missouri Petroleum Products Company), and O. Homer Riffe (of Riffe Petroleum Company). In addition, C. Kenneth Thies, who became a member of the Lashly firm on January 1, 1973, but who is now deceased, represented Phillips Petroleum Company, and Rexford H. Caruthers, who became a member of the Lashly firm on January 1, 1968, represented Patricia Lorenz (President of Union Asphalts and Roadoils, Inc.).

jury and the nature of the grand jury testimony of witnesses. In pursuit of this goal, defense counsel met repeatedly to discuss the status of the case, the results of their investigation and the proper course of future action, including the crucial decision of all defendants to change their initial pleas to the indictment of not guilty to pleas of *nolo contendere*. Defense counsel agreed to develop and assist each other in developing information from their clients and to cooperate in preparing the common defense.

Shortly after the commencement of the grand jury investigation, on October 20, 1964, Paul Rava of the Lashly firm initiated attempts to obtain information from John Hichew and Richmond Coburn, counsel for Shell and Amoco respectively, and suggested that the attorneys cooperate and exchange information.[3] Mr. Rava and counsel for Shell and Amoco and others *agreed* to exchange a variety of information in confidence, including debriefing memoranda of their respective grand jury witnesses.[4] Debriefing memoranda, including those of Shell and Amoco witnesses and clients of the Lashly firm, were deposited in the law offices of Mr. Coburn, where they were available to all and reviewed by various counsel for other defendants.[5] *According to the Lashly firm's own billing statement to their client Kerr-McGee Oil Industries, Inc., members of the Lashly firm in fact reviewed debriefing statements in connection with the case.*[6] Counsel for all defendants promised to develop in-

[3] *In Camera* Submission of Defendants Shell Oil Company and Amoco Oil Company, B-6, B-9. (Citations are to material contained in the record below.)

[4] *Id.* B-1 through B-6, B-31, C-3, C-4, C-32, C-36, C-61; Supplemental Submission of Defendants Shell Oil Company and Amoco Oil Company in Support of Motion to Disqualify, February 23, 1977; August 24, 1965 memorandum at 7; June 1, 1977 hearing, Tr. 18-21.

[5] *Id.* at B-1 through B-4; B-31 through B-34; C-61.

[6] June 3, 1977 hearing, Shell's Exhibit A, included in the Appendix at 23a.

formation from their clients.[7] A list of all grand jury witnesses compiled through the cooperative efforts of attorneys for the witnesses was distributed to all defense counsel, including Mr. Rava.[8] A joint defense fund was created.[9]

At counsel meetings, counsel for Shell and Amoco discussed their clients' plea intentions, including the consequences of proceeding to trial. As Mr. Coburn testified: "The evidence that we thought we had to face was discussed in the [counsel] meetings." [10] Mr. Rava of the Lashly firm admitted that he made efforts to develop information from other counsel relating to his client; that he had various contacts with Shell's counsel, John Hichew, and other counsel, "to find out something about the scope of what was going on . . . [and] the possible liability that may flow from the subpoena;" and that he followed the course of the grand jury proceeding and sought to determine the identity of the witnesses.[11]

Communications among counsel involved in the preparation of the joint defense effort were confidential. Describing this aspect of the prior proceedings, William H. Webster, a Judge of the Court of Appeals for the Eighth Circuit at the time he testified below (now Director of the Federal Bureau of Investigation), and counsel for another co-defendant of Shell and Amoco in the *American Oil* case, testified that counsel "agreed" discussions concerning grand jury testimony "should only be between

[7] Supplemental Submission of Defendants Shell Oil Company and Amoco Oil Company in Support of Motion to Disqualify, February 23, 1977; August 24, 1965 memorandum at 7.

[8] *Id.*

[9] *Id.* at 1-2.

[10] June 1, 1977 hearing, Tr. 24-25; *In Camera* Submission of Defendants Shell Oil Company and Amoco Oil Company, C-42, C-43, C-51.

[11] June 3, 1977 hearing, Tr. 98-100, 109.

attorneys representing defendants" [12] and that, in general, all communications among counsel were understood to be confidential since "we were in a common undertaking in the sense that we were representing joint defendants . . ." [13] Judge Webster, called by the Lashly firm as a witness, testified that he met with other counsel and discussed the substance of the grand jury testimony of their respective clients.[14] Indeed, before counsel for a number of co-defendants agreed to exchange debriefing memoranda of their employees' grand jury testimony with counsel for other defendants, they satisfied themselves that such communications were protected by the attorney-client privilege and the attorneys' work-product doctrine.[15]

B. The Proceedings Below.

1. *The Original Complaint.*

Fred Weber, Inc.'s original complaint here was filed on December 8, 1975, by Edward Weakley, then of the law firm of Boyle, Priest, Elliott & Weakley. It named only one defendant, Shell Oil Company, and was limited to certain breach of contract claims and an allegation of price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13(a).

The case was assigned to the Honorable John K. Regan.

2. *The Advent of the Lashly Firm and the Filing of the Amended Complaint.*

Thereafter, Mr. Weakley joined the Lashly firm. The Lashly firm and two of its partners, Paul Rava and William Rutherford, then became additional counsel of

[12] June 1, 1977 hearing, Tr. 58-59.

[13] *Id.* at 70-71.

[14] *Id.* at 50-51.

[15] Second Supplemental Submission of Defendants Shell Oil Company and Amoco Oil Company; Testimony of Richmond Coburn, Tr. 33.

record for Fred Weber, Inc. On May 3, 1976, Fred Weber, Inc., now represented by the Lashly firm, *ex parte*, filed an Amended Complaint, naming Standard Oil Company (Indiana), Amoco Oil Company and Shell Pipeline Corporation, as new defendants and adding counts which alleged, for the first time, that, since at least 1964, Shell and Amoco, along with other unnamed co-conspirators, conspired to fix prices and restrain trade in the sale of asphalt products in the State of Missouri in violation of the Sherman Act, 15 U.S.C. §§ 1, 2. The 1976 Amended Complaint, filed after the Lashly firm first entered the case, alleged substantially the charge of the 1965 indictment in *United States* v. *American Oil Company, et al.*, No. 65 CR 150(3), and alleged that the practices had continued since at least 1964.

During discovery in this case, the Lashly firm has indicated its intent to connect the subject matter of the two cases. Indeed, most recently, on March 8, 1978, in response to interrogatories requesting all facts in support of plaintiff's contention that the alleged conspiracy began not later than 1964, plaintiff expressly refers to the previous litigation and states:

> The underlying facts of defendant Shell and defendant Amoco's participation in the 1964 conspiracy may or may not be a part of the same conspiracy charged in the Amended Complaint. Such facts will at a minimum be admissible in the instant case on the issue of the historical intention of defendants Shell and Amoco to conspire to fix prices in asphalt products. This Court has held that the 1965 case is substantially related to this one. The nature and extent of that relationship will be the subject of further discovery.[16]

[16] Plaintiff's Answers and Objections to Certain of Shell's Interrogatories, Second Set, at 17, filed in the district court on March 8, 1978.

Yet, the Lashly firm previously had access to confidences of Shell and Amoco through the joint defense effort in the very litigation whose underlying facts they now seek to use against Shell and Amoco.

3. *Judge Regan Recuses Himself.*

On December 10, 1976, following a hearing on Shell's motion for partial summary judgment based upon the execution by Fred Weber, Inc. of two contracts containing release provisions, Judge Regan, *sua sponte*, recused himself "to avoid the appearance of impropriety" resulting from the fact that he had been the presiding judge in *United States* v. *American Oil Company, et al.*, No. 65 CR 150(3). After comparing the allegations of the 1965 indictment and Fred Weber, Inc.'s Amended Complaint, Judge Regan stated:

> Although the Court does not have a personal bias or prejudice concerning any party to the present case, the knowledge acquired in the criminal case and conclusions reached therein cannot be completely divorced from the mind of the Court. Hence, it is our view that in this situation the impartiality of the Court might reasonably be questioned, even though the parties have disclaimed any such purpose. In the exercise of our discretion and to avoid the appearance of impropriety, we believe that the ends of justice will be best served if this Court disqualifies itself in this case. (December 10, 1976 Order at 2.)

The case was then transferred to the Honorable John F. Nangle.

One month later, on January 10, 1977, Shell and Amoco jointly filed a motion to disqualify the Lashly firm as counsel for Fred Weber, Inc. due to that firm's prior representation of numerous co-defendants of Shell and Amoco in the earlier criminal proceedings, during the course of which they had access to confidences of Shell and Amoco.

4. *The Opinions of the Courts Below.*

The district court and the panel found that the Lashly firm represented numerous co-defendants of Shell and Amoco in *United States* v. *American Oil Company, et al.*, No. 65 CR 150(3), and that that litigation was substantially related to the present case.[17] The courts below also found that counsel for defendants in the prior proceedings agreed to cooperate fully in a common defense effort and that, as a result, members of the Lashly firm had the opportunity to review debriefing memoranda of grand jury testimony of defendants' personnel (App. 18a), including personnel of Shell and Amoco, which were maintained in a central depository in Mr. Coburn's office. There is no dispute that the Lashly firm had *access* to confidences of Shell and Amoco.

Nevertheless, both the district court and the panel denied the motion to disqualify on the sole ground that Shell and Amoco failed to establish that members of the Lashly firm actually received specific confidences of Shell and Amoco during the pendency of *United States* v. *American Oil Company, et al.*, No. 65 CR 150(3). (App. 18a)

The decisions of the district court and panel established a new and erroneous standard of proof, contrary to the prevailing case law which requires only a showing of *access* to confidential information for disqualification of counsel. Moreover, the courts failed to make any find-

[17] The standards for determining the existence of substantial relationship between two matters for purposes of disqualification of counsel are completely different from those governing the introduction of evidence. The allegations of violations of the antitrust laws in the two cases are substantially similar and the Lashly firm has indicated its intention to connect the two cases. On that basis the district court held that the two cases were substantially related. There was no evidence in the record as to the merits of either case. Shell and Amoco deny that they have violated the antitrust laws.

ing concerning the exchange of confidential information during the nine-month period of the grand jury investigation, a finding essential even under the erroneous standard of their decisions. The courts also failed to consider the impact of their ruling upon the conduct of multi-party litigation in which cooperation among co-counsel having a community of interest is required if such litigation is to be manageable and if parties are to obtain adequate representation by counsel.

REASONS FOR GRANTING THE WRIT

A. In Holding That Access to Confidences Is Insufficient to Mandate Disqualification, the Decision Conflicts With Decisions of the Court of Appeals for the Second Circuit.

Whether an attorney should be disqualified from representing a party in litigation against a party with whom he previously had a confidential relationship presents a question of acute sensitivity and importance, touching upon vital concerns of the legal profession and the public's interest in the scrupulous administration of justice.

Shell and Amoco now find themselves facing opposing counsel who previously had a confidential relationship with their counsel in earlier litigation which plaintiff alleges and the courts below found to be substantially related to the instant case. Surely, an attorney's ethical obligations with regard to the preservation of confidences prohibit such changing of sides. No client should ever be concerned with the possible use against him in future litigation of what he disclosed to his attorney or what his attorney disclosed to co-counsel in a joint defense to criminal charges.

Today, more than ever, litigation in federal courts is characterized by complex, multi-party cases involving numerous co-defendants, particularly in antitrust cases

as here. It is important for this Court to establish the rules of disqualification so that litigants will know whether disclosure of their confidences in a joint effort may subsequently be abused by counsel changing sides in substantially related litigation. Once this Court has set the rules, parties may govern their conduct accordingly.

Canons 4 and 9 of the American Bar Association's Code of Professional Responsibility establish strict standards of professional conduct which prohibit attorneys from abusing confidences reposed in them and from engaging in conduct which suggests even an appearance of impropriety. Disqualification of counsel is the means by which courts enforce these ethical obligations to prevent abuse of confidential relationships. Absent disqualification, the moral injunctions found in the Code of Professional Responsibility are meaningless.

The standard which governs the disposition of a motion to disqualify counsel on the basis of a prior professional relationship is one of *access* to confidences as a result of that relationship. In *T.C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953), the leading and most frequently followed case on disqualification, Judge Weinfeld ruled that

> [w]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.
>
> . . .
>
> [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained. (*Id.* at 268-69)

The standard set forth in *T.C. Theatre*—that a party need not demonstrate actual receipt of confidences by counsel—has been universally adopted by the courts. *E.g.*, *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *Chugach Elec. Ass'n* v. *United States District Court for the District of Alaska*, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967). It applies whether or not there has been a direct attorney-client relationship with the counsel sought to be disqualified. *See, e.g., Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128 (2d Cir. 1976); *Hull* v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975).

The reason for not requiring proof of actual receipt of specific confidences once *access* to such confidences by a prior confidential relationship has been established is obvious and compelling. If a party must demonstrate not only access, but also actual exchange of confidences, then it will, as a matter of necessity, have to disclose the very confidences sought to be protected in violation of the attorney-client privilege. As Judge Weinfeld stated:

> For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. It would defeat an important purpose of the rule of secrecy—to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause. Considerations of public policy, no

less than the client's private interest, require rigid enforcement of the rule against disclosure. (*T.C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953).)

See Emle Industries, Inc. v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973) ("Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 . . . .")

The panel recognized this principle, but limited its application to the situation where a party seeks to disqualify its former counsel, stating that then one need not show that there was, in fact, an exchange of confidences because the "compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved" (App. 9a.).

This, however, is precisely the situation presented here where the Lashly firm's access to confidences of Shell and Amoco is undisputed. The panel distinguished the present case on the basis that the Lashly firm had not repreesnted Shell and Amoco directly but had only represented co-defendants of Shell and Amoco.

That distinction, however, is directly contrary to decisions of the Second Circuit and ignores the fundamental basis for the *access* standard. A prior direct attorney-client relationship is not a prerequisite to disqualification. *See, e.g., Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); *Estates Theaters, Inc.* v. *Columbia Pictures Indus., Inc.*, 345 F. Supp. 93 (S.D.N.Y. 1972); *W. E. Bassett Co.* v. *H. C. Cook Co.*, 201 F. Supp. 821 (D. Conn. 1962) (disqualified attorney never represented party seeking disqualification).

In three recent cases, the Second Circuit disqualified counsel from any further representation against an opponent to whose confidences they had *access*, notwithstanding the fact that they had never represented that party nor had they been shown to have received any confidences of that party. *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128 (2d Cir. 1976); *Hull* v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975). Indeed, the Second Circuit specifically rejected "as overly technical" the argument, identical to that adopted by both the district court and court of appeals here, that proof of actual receipt of specific confidential information was required as a precondition to disqualification in the absence of the existence of an express attorney-client relationship.[18] *NCK Organization Ltd.* v. *Bregman*, 542 F.2d at 134; *Hull* v. *Celanese Corp.*, 513 F.2d at 571-72.

Rather, the rule governing disqualification in the Second Circuit is that disqualification is required ". . . where some evidence exists of the possibility that disclosures were made in the past of which the [counsel] cannot dispossess itself . . ." *NCK Org'n Ltd.* v. *Bregman*, 542 F.2d at 134. Or, stated slightly differently: whether the attorney, though never having represented the party

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[18] The panel's attempted distinction of the *NCK* and *Hull* cases (App. 10a) reflects an obvious and serious misreading of those two cases.

The panel suggests that the two cases are consistent with its ruling that no court has ever applied the presumption of exchange of confidences required by Canon 4 of the American Bar Association's Code of Professional Responsibility in the absence of an attorney-client relationship. In neither case, however, was there an attorney-client relationship between the party seeking disqualification and counsel who was disqualified. The only attorney-client relationship which existed in those two cases—that between the party seeking disqualification and the attorney through whom opposing counsel had access to the moving party's confidences—is also present here where Shell and Amoco communicated confidences to their own counsel who, in the conduct of a joint defense effort and under the protection of the attorney-client privilege, made such confidences available to counsel for other defendants.

seeking disqualification, was, "through his relationship" with that party's counsel, "in a position to receive relevant confidences . . .," *Fund of Funds* v. *Arthur Andersen & Co.*, 567 F.2d at 235.

Both Judge Webster and Mr. Coburn testified as to the extensive exchanges of confidential information among counsel during the grand jury investigation and subsequent criminal case. For Shell and Amoco to have elicited further testimony would have necessitated the disclosure of the very confidences exchanged among counsel which are sought to be preserved.

Mr. Rava admitted that he discussed the grand jury investigation with Mr. Hichew. Although Mr. Rava did not recall looking at debriefing memoranda which were available to him for review in Mr. Coburn's office, the Lashly firm's billing statement describes as one of the services rendered to their client Kerr-McGee "review of debriefing statements", and copies of debriefing statements of the Lashly firm's clients were maintained in the joint depository in Mr. Coburn's office for review by other counsel. If Shell had further cross-examined Mr. Rava, it would have entailed, among other things, the showing of Shell's debriefing statements to him in an effort to refresh his recollection as to the confidences imparted to him by Shell's counsel, who is now deceased. Thus, just as in the case where an attorney-client relationship exists, the very confidences Shell seeks to preserve would be disclosed.

Recognizing the unacceptability of such disclosure of confidences, Henry S. Drinker, in the classic text on legal ethics, stated:

> [W]here counsel is aware that confidence has been reposed in him by someone not his client, but who has been assisting his client with information, he should not afterwards act against that person in any matter in which such information would be material. (*Legal Ethics* at 106 (1953).)

No less is required here. To compel disclosure of the actual confidences previously entrusted to counsel would tear aside the protective cloak drawn about the attorney-client relationship.

The conflict between the Eighth and Second Circuits could not be more plain or irreconcilable: the Lashly firm would be disqualified in the Second Circuit because it had *access* to confidences of Shell and Amoco, whereas in the Eighth Circuit it is permitted to switch sides and continue its representation.[19]

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[19] While the appeal here was pending in the Eighth Circuit, the Court of Appeals for the Fifth Circuit decided *Wilson P. Abraham Construction Corp.* v. *Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977), which also involved the issue of disqualification of counsel who had previously represented a co-defendant in an earlier related proceeding. The Fifth Circuit stated:

> Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense. *Id.* at 253.

The Fifth Circuit indicated that if counsel had been *privy* to confidences of his co-defendants, he should not be permitted to change sides in subsequent related litigation. The court set aside the district court order denying the motion to disqualify and remanded for the entry of formal findings of fact as to the content of the information exchanged among counsel and whether or not the present litigation was substantially related to the prior one. Here, in contrast, it is undisputed that the Lashly firm had *access* to debriefing memoranda of Shell and Amoco grand jury witnesses and that the panel found that the prior proceedings are substantially related to the instant case.

B. The Decision Threatens an Abuse of Confidences Exchanged Under Protection of the Attorney-Client Privilege.

During the prior criminal proceedings, Judge Regan directed that the defendants cooperate, and counsel for Shell and Amoco exchanged a variety of confidential information with other defense counsel. These exchanges were made in confidence and under the protection of the attorney-client privilege, which although normally waived by disclosure to third parties, has been specially extended to protect such joint defense exchanges.[20] *In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. 381 (S.D.N.Y. 1975); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Co.* v. *United States*, 330 F.2d 347 (9th Cir. 1964). Protecting such confidential communications is an important part of the client's right to adequate representation by counsel. *Continental Oil Co.* v. *United States*, 330 F.2d at 350.

The panel's ruling, however, threatens the inviolability of such confidential communications by permitting an attorney to manipulate a confidence acquired in an earlier representation and to transform it into a telling advantage in subsequent litigation. *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973). It

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[20] *See also* Standard 503(b) of the Proposed Federal Rules of Evidence, 56 F.R.D. 183 (1972), approved by this Court ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . (3) by him or his lawyer to a lawyer representing another in a matter of common interest. . . ."); 2 Weinstein and Berger, *Weinstein's Evidence* ¶ 50 [02] at 501-20.4 to 501-20.5 (1976).

Likewise, the work product of attorneys engaged in a common defense is protected from disclosure. *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974); *Transmirra Products Corp.* v. *Monsanto Chemical Co.*, 26 F.R.D. 572, 578 (S.D.N.Y. 1960); *Leonia Amusement Corp.* v. *Loew's Inc.*, 13 F.R.D. 438, 440 (S.D.N.Y. 1952); *Smith* v. *Bentley*, 9 F.R.D. 489 (S.D.N.Y. 1949).

impermissibly infringes upon defendants' ability to exercise their constitutional right to effective assistance of counsel by penalizing the exercise of that right.

It is precisely to protect against such an abuse of confidences—which cannot otherwise be monitored[21]—and to ensure that "no client should ever be concerned with the possible use against him in further litigation of what he may have revealed to his attorney,"[22] that disqualification of counsel is required under the prophylactic provisions of Canons 4 and 9 of the Code of Professional Responsibility.[23]

That is the situation presented here: having cooperated in the preparation of the joint defense to the previous criminal proceedings by exchanging confidential information, under protection of the attorney-client privilege and at the direction of Judge Regan, Shell and Amoco now find themselves facing an opponent making the same charges in a treble damage action—ten years later—who is represented by counsel who participated in that joint defense effort and who had access to their confidential information. The policies which require disqualification in the context of a direct attorney-client relationship also require it here.

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[21] The attorney-client privilege alone is obviously inadequate since it operates only to prevent further compelled disclosure but not to police the use of such information in the hands of opposing counsel in developing litigation strategy or planning discovery. *See, e.g., Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d at 571; *Chugach Elec. Ass'n* v. *United States District Court for the District of Alaska*, 370 F.2d 441, 443 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967).

[22] *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953).

[23] Significantly, counsel's ethical obligations with respect to preservation of confidences extend far beyond the protection of the attorney-client privilege. ABA Code of Professional Responsibility, Ethical Consideration 4-4.

C. The Panel's Decision Threatens the Manabeability of Multi-Party Litigation.

The mischievous consequences of the panel's decision are not confined to one instance of threatened abuse of confidential communications. The standard established by the panel conflicts with the procedures established by the Judicial Panel on Multidistrict Litigation and will inevitably hamstring the conduct of multi-party litigation in which the exchange of confidential information among defense counsel is recognized as essential to the manageability of such cases. The Manual for Complex Litigation directs co-defendants to cooperate, to form joint committees and pool and exchange confidential data under the protection of the attorney-client privilege as a means of making complex cases manageable. §§ 1.92, 1.93.[24]

The panel's ruling collides head-on with both the rights of litigants in complex multi-party cases to prepare an effective defense and the ability of courts to manage and supervise such litigation. In the prior litigation there were 35 defendants named as co-conspirators who had allegedly violated the antitrust laws. Unless parties can reasonably be assured that confidential information exchanged among counsel for parties with a community of interest, under protection of the attorney-client privilege, will not return to haunt them in subsequent litigation in which the opposing party is represented by former counsel for co-defendants, no party can afford to engage in the type of cooperative effort upon which the conduct of such multi-defendant litigation so crucially depends.

Under the panel's ruling, litigants who are otherwise encouraged or, indeed, often directed by courts, to cooperate and exchange confidences will be faced with a

[24] Indeed, in the earlier criminal proceeding, Judge Regan ordered counsel for the 35 defendants to work in concert.

harsh dilemma: work together and exchange such information in preparing a common defense and, thereby, risk having it turned to one's disadvantage in a subsequent related case by an attorney who has switched sides or, refrain from such an exchange and thereby jeopardize one's ability to conduct an adequate defense. If defendants in complex cases refuse to exchange information and decline to cooperate by presenting joint positions, multi-party litigation cannot be managed.

The standard adopted by the Court of Appeals—proof of actual receipt of specific confidences rather than access to confidences—is improper. If a party satisfies the test by disclosing the specific confidences which had been exchanged, then the very purpose of the attorney-client privilege has been defeated. Public policy, as well as the client's private interest, require the rigid enforcement of the rule against disclosure. Moreover, explicit proof of actual receipt of confidences will seldom, if ever, be available to a party—certainly not ten years later. Key participants may die,[25] or forget the details of specific conversations.

Disqualification of opposing counsel who had access to confidential communications is the only practicable solution. Otherwise, in the end, the only real assurance a party can have that its confidences will not be abused will be to withhold information from its own counsel or instruct its counsel not to cooperate with counsel for co-defendants. The necessary result will be a debasement of the attorney-client relationship, a degradation in the quality of professional representation and the unmanageability of multi-party litigation.[26]

[25] Here, for example, John Hichew, Shell's counsel in the prior proceedings, is now deceased.

[26] The Department of Justice proposed Draft Bill Amending Rule 23, F.R. Civ. P., § 3021(b), provides that in multi-party litigation the court should seek to have the parties designate one

D. The Panel Ignored the Undisputed Evidence Which Establishes That the Lashly Firm Received Confidences of Shell and Amoco.

Even accepting the panel's improper standard, the undisputed evidence, described at pages 4-8 herein, demonstrates that members of the Lashly firm received confidences of Shell and Amoco. The Lashly firm's own billing statement to its client Kerr-McGee stated that it reviewed debriefing statements (App. 23a), but this was not even mentioned by the district court or the panel. Similarly, both the panel and the district court disregarded the nine month long grand jury investigation and instead treated the prior proceedings as though they consisted solely of an indictment followed by a rapid plea of *nolo contendere*. *Even under the standard established by the district court and panel*, the result achieved below could only be supported by a finding that there was no exchange of confidences during the nine-month period of the grand jury investigation—a finding which is conspicuously absent from the opinions below.

Likewise, the panel's finding that discussions during the period of the indictment and disposition of the criminal case involved "procedural" matters only (App. 13a) is contrary to the record. It is impossible to segregate arbitrarily discussions concerning substantive matters from those which involve "procedural" matters, as the Panel did here. In order for counsel to determine competently whether to advise his client to enter a plea of guilty or *nolo contendere*, or whether to file a bill of particulars, they must necessarily discuss the evidence in the case with counsel for other defendants. Mr. Coburn testified that in connection with the decision to change defendants' pleas from not guilty to *nolo con-*

attorney on each side to act as lead counsel. Co-counsel could not possibly agree to such designation if such counsel could one day switch sides, as here, and, represent another party in substantially related litigation against former co-defendants.

tendere, counsel for all parties did, in fact, discuss critical and confidential information.[27] There is no basis for the Panel's assumption that no matters of "substance" were discussed. Moreover, however the discussions are characterized, they would not have taken place in the presence of the Lashly firm had counsel for Shell and Amoco known that one day the Lashly firm would switch sides and sue their co-defendants in litigation they claim is substantially related to the prior criminal proceedings. Counsel agreed that their discussions were confidential. No further inquiry is necessary.

The Panel's decision must be reversed for its cavalier disregard of the evidence alone.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[27] June 1, 1977 hearing, Tr., 24-25.